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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

JULES GORDON, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JULES GORDON, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 1, 1957.

OPINION BELOW

The opinion below has not yet been reported, either as originally filed (Appendix A(1), pp. 1a-10a) or as amended on denial of rehearing (Appendix A(2), p. 11a).

JURISDICTION

The judgment of the court of appeals (Appendix B, p. 12a) was entered on March 1, 1957. A timely petition for rehearing was denied, with modification of the opinion, on April 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, where an indictment alleges a conspiracy to violate the statute prohibiting an attempt to defeat or evade a tax, such conspiracy involving the rendering by a revenue agent of a false report understating the taxpayer's tax liability, the conviction of a co-conspirator can be sustained in the face of the revenue agent's acquittal and in the absence of competent proof that the revenue agent's report was in fact false.

2. Whether an expert witness's conclusions as to what was shown by voluminous records is competent, over objection, where those records are neither offered in evidence nor made available at the trial.

3. Whether, in a prosecution for conspiracy to commit a substantive crime, it is a sufficient definition of such substantive crime simply to read the indictment to the jury.

4. Whether, in order to sustain the present conviction, the court below so far departed from its previous rules as to the admissibility of evidence and as to the sufficiency of a charge in a conspiracy case that an exercise of this Court's supervisory powers is called for.

STATUTES INVOLVED

1. Section 145(b) of the Internal Revenue Code of 1939 provides:

"**§ 145. Penalties.**

* * * *

"**(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under

this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. Title 18, Section 371, United States Code, provides:

"§ 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT

Petitioner was indicted, together with one Tanz, an Internal Revenue Agent, for conspiring in violation of 18 U.S.C. § 371, quoted above, to commit an offense against the United States, viz., to willfully attempt to evade and defeat a large part of the income tax due and owing to the United States by Alfred and Doris McClure for the year 1948, in violation of 26 U.S.C. § 145(b). The indictment (App. 2a-3a)* alleged that the conspiracy was

*"App." refers to the Appendix filed by petitioner below and there designated Appellant's Appendix. "U.S. App." refers to the Appendix filed by the Government below and there designated Appellee's Appendix. Nine extra copies of each have been filed.

to be effectuated by Tanz's filing of a false and fraudulent report to his superiors in the Bureau of Internal Revenue which would understate the tax due from the McClures, and that petitioner, Tanz, and one Harper, McClure's accountant who was named as a co-conspirator but was not indicted, would exact money from Alfred McClure in consideration of Tanz's filing of a false report.

Tanz was also separately indicted for a further conspiracy (App. 313a).

Tanz was acquitted under both indictments (App. 324a); petitioner was convicted (*id.*), and on appeal his conviction was affirmed.

The McClures were residents of Troy, Pa., where Alfred McClure was a Ford-Mercury dealer during the tax years in question (App. 15a). They filed their income tax returns for the years 1947 and 1948, showing tax due in the respective amounts of $1,808.50 and $1,315.70, which they paid (Ex. G-1; Ex. G-2, U. S. App. 11b).

In April 1950, Tanz visited McClure's place of business to make an income tax audit of the taxpayer's books and records covering the years 1947 and 1948 (App. 38a, 141a). Several weeks later, Tanz returned and met McClure's accountant, Harper (App. 140a).

On May 22, 1950, Alfred McClure had his brother deliver to Harper a check to the latter's order in the amount of $5,000, to apply to additional income taxes which might be due (App. 51a, 96a, 149a, 173a, 174a; Ex. G-8, U. S. App. 20b-21b). McClure charged this check to his income tax account on his books (App. 136a). At this time McClure had expected that the total amount of the additional taxes would be about $9,500 (App. 51a, 69a). He was told this by Harper, who did not explain how the figure was arrived at (App. 90a-91a).

In June or July 1950, McClure engaged an independent firm of accountants to audit his books and to determine the

correct amount of tax owing, if any, and those accountants after completing the audit advised him that additional taxes were due in the amount of around $4,300 (App. 57a, 60a-65a).

When Harper met Tanz at McClure's place of business in Troy in April 1950, Tanz said that the taxes due for 1947 and 1948 would be approximately $17,000 (App. 141a). Tanz sought to complete his examination, and accordingly wrote to Harper in May 1950, stating that he had received no reply to his previous letter to McClure (App. 195a; Ex. D-1, U. S. App. 26b).

As a result, Harper went to Philadelphia on June 10, 1950, where he met Tanz at the latter's home, after trying to reach him at his office (App. 195a). Tanz had also requested the presence of McClure (App. 147a), but the latter did not attend (App. 149a).

At their meeting, Tanz told Harper that McClure's taxes would probably be less than $17,000, and that the matter could probably be closed for a final tax of between $8,000 and $9,000 (App. 150a-151a). At this time, also, Tanz told Harper that he would refer a friend to him who could assist (App. 151a). Later that day, a man, identified by Harper at the trial as petitioner, met Harper in Philadelphia, introduced himself as Mr. Jones, and told Harper that, as soon as he obtained the work papers from Tanz, he would get in touch with Harper (App. 151a).

On June 21, 1950, Tanz filed his audit report showing additional taxes due by the McClures in the amount of $4,037.35 (Ex. G-6; U. S. App. 15b-18b).

In July 1950, petitioner, by telephone, arranged a meeting with Harper for several days later in Wilkes-Barre (App. 152a-153a). At this meeting, petitioner told Harper that he had effected a computation, and that the tax would run between $8,000 and $9,000 (App. 153a). Harper then gave petitioner $3,000 in cash, which he had obtained by

cashing the check McClure had previously given him (App. 153a-154a). Harper, a government witness, testified that his purpose was to pay the tax owed to the United States (App. 177a).

Early in September 1950, Harper received from the Internal Revenue Service the McClure tax bills, showing a tax due in an amount in excess of $4,000 for 1947 and 1948 (App. 155a). The principal sum shown in that bill to be due for 1948, $492.80 (Ex. G-5, U. S. App. 14b), was identical with the additional tax for 1948 shown to be due in Tanz's report (Ex. G-6 at U. S. App. 15b). Harper immediately complained to Tanz, by telephone, that the $3,000 he had given to petitioner was not shown as a credit (App. 155a), and Tanz said he would have to call back (App. 157a).

Subsequently, petitioner called Harper, and a meeting was arranged with Harper and McClure in Elmira, N. Y. (App. 157a). McClure, Harper, and petitioner, who was introduced as Smith, met, together with McClure's independent accountants (App. 156a). Petitioner spoke to McClure privately, and asked him to pay the tax bills (App. 94a). Petitioner returned $2,500 of the money Harper had given him, retaining $500 as a fee (App. 94a, 111a). Harper returned $1,800 to McClure, deducting $200 for his expenses (App. 178a). McClure made out his check in payment of the tax bills, in the amount of $4,575.63 (App. 96a; Ex. G-9, U. S. App. 22b-23b).

Harper did not intend to help McClure evade and defeat his tax, nor was he trying to cheat the government, nor did he make any agreement with petitioner or Tanz to help cheat the government (App. 198a). He did not make any agreement with anybody that he would corrupt anybody (App. 199a). He did not make any agreement with petitioner to attempt to defeat a large part of McClure's taxes (App. 203a). He did not give the $3,000 to petitioner to bribe Tanz to make a false report (App. 205a).

As part of its case in chief, the Government adduced the testimony of an expert, the Revenue Agent Tinsley (App. 214a). Tinsley testified that there was a distinction between a "field audit" and a "complete audit," and that an internal revenue agent must use his judgment concerning the extent of his audit (App. 252-257a).

Tinsley further testified that in June 1952 he had made a "complete audit" of McClure's books—not a "tax audit" (App. 259a)—and that the complete audit required twenty-six days, with the assistance for ninety per cent of the time of another agent, and for ten per cent of the time of a third agent (App. 251a).

Tinsley was unable to say whether the books were in the same condition as when seen by Tanz (App. 259a). He knew that McClure's independent accountants had worked on the books and made adjusting entries (App. 261a), and said he took such entries into consideration (App. 262a).

Tinsley testified at length that there were various items which he allowed and disallowed, based upon his own examination of McClure's books, vouchers, receipts, etc., and upon his investigation (App. 218a-252a). None of the books, vouchers, receipts, etc., were introduced in evidence, but all remained at the McClure place of business in Troy, Pa. (App. 258a).

Counsel for Tanz objected to the witness Tinsley's testimony to his conclusions as to what the records showed in the absence of those records (Tr. 221a, 223a, 250a-251a, 258a-259a), and at the conclusion of his testimony moved to strike it (App. 306a), "because it was based upon records not produced, not offered in evidence, and therefore it violates both the hearsay rule, the best evidence rule." Counsel for petitioner joined in those objections in his motion for judgment of acquittal (App. 307a-308a). The motion to strike Tinsley's testimony was denied (App. 306a).

In his charge to the jury, the district judge covered the elements of the offense of conspiracy (App. 316a-319a). He did not define the substantive offense that the defendants were charged with conspiring to violate but merely read the indictment to the jury (App. 314a). Petitioner's trial counsel did not except or object to the charge.

As has been indicated, petitioner was convicted, while Tanz was acquitted on both indictments. Petitioner's renewed motion for judgment of acquittal and in the alternative for a new trial (App. 325a-326a) was denied (App. 1a), and petitioner was sentenced to a year's imprisonment and a fine of $1,000 (*id.*).

On appeal, the judgment of conviction was affirmed, the court below saying (Appendix, *infra*, pp. 9a-10a) that "it was not necessary to prove the falseness of the Tanz report in order to sustain the conviction of Gordon on the charge of conspiracy," citing *United States* v. *Albanese*, 224 F. 2d 879, 882. A petition for rehearing was denied, though the court amended its opinion to eliminate the earlier erroneous statement that Harper's denial of the existence of a conspiracy had been stricken from the record (Appendix, p. 11a, *infra*).

REASONS FOR GRANTING THE WRIT

Opinions in this Court, particularly in recent years, have repeatedly reflected an awareness of the dangers implicit in prosecutions for conspiracy. See *Gebardi* v. *United States*, 287 U.S. 112, 122; *Kotteakos* v. *United States*, 328 U.S. 750, 776-777; *Von Moltke* v. *Gillies*, 332 U.S. 708, 721-722, 727-729; *Krulewitch* v. *United States*, 336 U.S. 440, 445-458; *Nye & Nissen* v. *United States*, 336 U.S. 613, 625-626. Those dangers appear in a new context here.

1. The gravamen of the present indictment was that petitioner, Tanz, and Harper conspired to defeat the tax owing by the McClures; the gist of the conspiracy alleged in the indictment, and the only possible way by which that

conspiracy could be effected, would be for the revenue agent Tanz to make a false report to his superiors in the Internal Revenue Service concerning the McClure's tax liability (App. 2a-3a). No other conspirator could possibly do this; a false official report was essential to the object of the conspiracy alleged, and only Tanz could make an official report. If Tanz's report were not false but truthful, then there was no tax owing by the McClures that could be defeated.

Harper was not indicted, and Tanz was acquitted. As the court below pointed out (Appendix, pp. 4a-6a), petitioner could consistently with Tanz's acquittal be convicted of conspiring with Harper. But he could only be convicted of conspiring with Harper to do what he was charged with doing, viz., to defeat a tax due. And, unless Tanz's report was willfully and knowingly false, there would be no conspiracy to defeat a tax, but only a conspiracy to obtain money from McClure by false pretenses—which was not the offense charged in the indictment.

Therefore the falsity in fact of Tanz's report was essential to a conviction of each of the indicted conspirators—and no competent proof of such falsity appears in the record.

Tanz reported a tax deficiency covering both 1947 and 1948 of $4,037.35 (Ex. G-6; U.S. App. 15b-18b). This was in accord with the figure arrived at by McClure's independent accountants (App. 57a, 60a-65a), and was likewise in accord with the sum paid by McClure (App. 96a; Ex. G-9, U.S. App. 22b-23b).

The only testimony tending to show error in Tanz's report was that of Tinsley, on the basis of an examination of McClure's books that had lasted 26 days and was made by Tinsley with the assistance of two other agents (App. 251a). Tanz's examination had covered only 2 days and 6 hours (Ex. G-6 at U.S. App. 15b). But Tinsley's testi-

mony consisted only of conclusions drawn by him from a mass of records neither produced in evidence nor available at the trial (App. 258a) and so was plainly incompetent. *United States* v. *Ward*, 169 F. 2d 460 (C.A. 3); *United States* v. *Michener*, 152 F. 2d 880 (C.A. 3). It is only when the original books themselves are available that the summaries become admissible. *United States* v. *Augustine*, 189 F. 2d 587 (C.A. 3).

It is literally impossible to follow the reasoning on this point of the court below, which said (Appendix, pp. 9a-10a):

> "* * * it was not necessary to prove the falseness of the Tanz report in order to sustain the conviction of Gordon [the present petitioner] on the charge of conspiracy. See United States v. Albanese, 224 F. 2d 879, 882 (C.A. 2, 1955). If it were error, only Tanz would have been prejudiced and, as we have seen, Tanz was acquitted."

But actually, as has been pointed out, petitioner would likewise be prejudiced, since the falsity of Tanz's report was the vital element in any conspiracy to defeat taxes. And the *Albanese* case at the page cited holds only that a taxpayer can, without signing a tax return, violate § 145(b) by other means. *Albanese* is plainly irrelevant here, where the issue does not concern the taxpayer's return, but rather the revenue agent's official *report* concerning that *return*, and where the revenue agent and those alleged to have conspired with him to violate § 145(b) could not possibly have fallen within that statute unless the revenue agent's return was false in fact. For, if no tax is due, then there can be no conviction either under § 145(b) or under a charge of conspiracy to violate § 145(b). *United States* v. *Schenck*, 126 F. 2d 702, 704 (C.A. 2).

Therefore, since there was no competent proof of the indispensable ingredient of the conspiracy charged in the indictment, viz., the falsity of the Tanz report, it follows

that petitioner's conviction under that indictment cannot be sustained.

2. The district judge in charging the jury outlined the elements of the offense of conspiracy at length (App. 316a-319a), but did not define the substantive offense that petitioner was charged with conspiring to commit; on that point he merely read the indictment (App. 314a). This is plainly insufficient. "A trial court does not discharge its duty merely by quoting a statute relevant to the conduct of the trial." *United Brotherhood* v. *United States*, 330 U.S. 395, 416, *per* Frankfurter, J.

It is true that there was no objection to the charge, but a long line of cases in the court below establishes that a trial judge's failure to define the offense is error so plain and vital that it requires reversal on appeal even in the absence of objection. *United States* v. *Lang*, 239 F. 2d 676; *United States* v. *Cumberland*, 200 F. 2d 609; *United States* v. *Petrie*, 184 F. 2d 417; *United States* v. *Pincourt*, 159 F. 2d 917; *United States* v. *Max*, 156 F. 2d 13; *United States* v. *Noble*, 155 F. 2d 315; *United States* v. *Levy*, 153 F. 2d 995. Reading the accusation to the jury cannot stand on any higher footing than letting the jury read it for themselves, a practice condemned as insufficient in the *Noble* case, *supra*. And the failure of a trial judge to define the substantive offense in a conspiracy case is, certainly in the court below, fundamental error requiring reversal. *United States* v. *Yasbin*, 159 F. 2d 705.

It is no answer to say, as the Court below did (Appendix, pp. 7a-9a), that the offense under § 145(b) of the Internal Revenue Code of 1939 is so simple that it does not need to be defined. Litigation in that court, and elsewhere, establishes that the proper definition of the elements requisite to a violation of § 145(b) presents a problem of very considerable difficulty. *United States* v. *Martell*, 199 F. 2d 670 (C.A. 3); *Forster* v. *United States*, 237 F. 2d 617 (C.A. 9), and cases there cited.

And the court below did not undertake even to suggest why its previous decisions as to the necessity for defining in the charge the elements of the offense alleged even in the absence of request therefor had now suddenly become inapplicable. Its earlier rulings were neither disapproved nor distinguished; they were simply ignored. A different rule was applied to this petitioner than had been previously applied to persons in his precise position.

3. There is presented here, therefore, a situation where the conviction of one indicted conspirator is upheld only in disregard of the essential element of the conspiracy; in disregard of a settled rule of evidence; and in disregard of a settled rule as to the need for advising the jury as to the nature of the substantive offense which the defendants are alleged to have conspired to violate.

It is therefore well nigh impossible to avoid the conclusion that petitioner's conviction was sustained, not through the application of rules of law hitherto well recognized, but in disregard of those rules, essentially because petitioner was deemed to be an unworthy person who appeared to have harbored an evil intent and was guilty of evil thoughts.

Thus the dangers heretofore believed to be implicit in prosecutions for conspiracy are shown to be real and not merely chimerical. The present case, accordingly, calls for review by this Court, lest the offense of conspiracy be now employed, as in this instance, to deal with ill-intentioned persons in a manner not otherwise lawful, viz., by charging them with one crime and convicting them of another. *Cole* v. *Arkansas*, 333 U.S. 196; *Schooner Hoppet* v. *United States*, 7 Cranch 389, 394.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Counsel for the Petitioner.

APRIL 1957.

APPENDIX A

OPINIONS BELOW

(1) Original Opinion

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,972

UNITED STATES OF AMERICA

v.

JULES GORDON, *Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 18, 1956

Before MARIS, GOODRICH and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 1, 1957)

By STALEY, *Circuit Judge.*

Appellant Jules Gordon was convicted of conspiracy to commit an offense against the United States, that is to attempt willfully "to evade and defeat a large part of the income taxes due and owing to the United States of America by Alfred W. McClure and Doris K. McClure for the year 1948, in violation of 26 U.S.C. § 145(b)." The conspiracy is in violation of Section 371 of Title 18 of the United States Code. Norman Tanz, an Internal Revenue

agent, was tried on the same indictment but was acquitted. Clifford Harper, an accountant for the McClures, was named as co-conspirator but was not indicted. The convicted Jules Gordon, also an accountant, was sentenced to one year's imprisonment and fined $1,000. It is from this sentence and judgment that he appeals.

The following circumstantial evidence was produced by the government in its endeavor to prove a conspiracy to evade income tax among Norman Tanz, Clifford Harper, and appellant Gordon. Alfred W. McClure was the owner of an automobile agency in Troy, Pennsylvania. He and his wife filed their joint income tax return for 1948 showing an amount due of $1,315.70; this amount they paid. In April of 1950, Internal Revenue Agent Tanz visited McClure's place of business for an audit of books and records for 1947 and 1948. Tanz informed McClure that he owed the government a considerable amount of money in additional taxes. Later that same month, Tanz again went to McClure's agency and reaudited the boks and accounts. McClure and Harper were both present when Tanz told them that $17,000 more was due as 1948 tax. Harper received a letter from Tanz dated May 16, 1950, suggesting that Harper contact him without further delay in an effort to complete the McClure audit. The letter was typed on plain paper, not official stationery. Harper phoned Tanz and was informed that Tanz had recomputed the tax due from McClure as between $8,000 and $9,000, and that the amount would have to be paid in cash. Around May 23, 1950, McClure transmitted a check for $5,000 to Clifford Harper, payable to his order personally. Harper indorsed and negotiated the check, keeping the $5,000 in cash in his home.

On June 11, 1950, Harper visited Tanz at his home in Philadelphia and Tanz told Harper that he had a friend who could effect a quick settlement of the McClure tax matter for $8,000 or $9,000. Tanz's friend was appellant Jules

Gordon, who drove to the place where Harper was staying in Philadelphia and introduced himself as "Mr. Jones." On June 21, 1950, Tanz filed his agent's report showing that the McClures owed only $492.80 in additional tax for 1948. A government tax expert, Tinsley, testified that he audited McClure's records and books and concluded that the tax due from the McClures in 1948 was $11,640.76.

In early July of 1950, appellant Gordon called Harper at the latter's home in Sayre, Pennsylvania, and at Gordon's suggestion they agreed to meet at a hotel in Wilkes-Barre. There appellant inquired of Harper whether he had any money with him to pay on the McClure tax account, adding that $8,000 or $9,000 would be needed to settle it. Harper told him that he had only $3,000 in cash, and although appellant was disappointed, he took the money and left. Later, Tanz told Harper that he knew of the $3,000 which Harper gave appellant.

Harper testified that in early September of 1950 he called Tanz to complain that a bill he received for the McClures' tax did not reflect the $3,000 which was already paid appellant. After Tanz got in touch with appellant concerning this matter, the latter phoned Harper and arranged a meeting with McClure and Harper at a hotel in Elmira, New York. Throughout all of the events up to this conversation, appellant Gordon used the assumed name of "Jones." At the end of the conversation, he informed Harper that his name was now "Smith."

At the hotel in Elmira, appellant said that he wanted to see McClure alone upstairs. There he told McClure that $4,500 was still due on his tax account. McClure refused flatly to pay, stating that he had already given Harper $5,000 and that an independent accounting firm had audited his books for 1948 and confirmed his belief that no further payments were due. Faced with this turn of events, appellant Gordon, at this point appearing to be in a hurry, handed McClure $2,500 in cash, saying that $2,000 was from

him and $500 was from Tanz. McClure called downstairs for his accountant Harper. When Harper came into the room, he returned to McClure $1,000 or $1,800, the amount being in dispute.

The appellant raises five material allegations of error which must be answered on this appeal: (1) Does the acquittal of Tanz require the acquittal of Gordon for want of capacity to commit the offense? (2) Was the evidence sufficient to sustain the conviction? (3) Did the instructions to the jury adequately define the elements of the offense charged? (4) Was it error to permit the government tax expert Tinsley to testify in view of the fact that all of the records of the McClure agency were not in evidence? (5) Was it error to read to Harper notes of his grand jury testimony without an instruction that such evidence is not substantive?

The Effect of the Acquittal of Tanz.

One of the principal arguments of the appellant is that the acquittal of Tanz requires his acquittal also. This contention is predicated upon the erroneous belief that only Tanz had the capacity to commit the crime proscribed by Section 145(b) of Title 26; and since Tanz was acquitted, only appellant and Harper were left to conspire. Neither he nor Harper, continues the argument, had the capacity to commit the offense, and therefore he must be acquitted.

The fallacy of this reasoning is rooted in the appellant's misconception of the nature of the crime which was the object of the conspiracy. The offense described by Section 145(b) of Title 26 is a willful attempt "in any manner to evade or defeat any tax." It is true that one manner of such attempt may be the willful filing of a false report with the taxing authorities. But to conclude that the willful filing of a false report or return is the only way "to evade or defeat any tax" is to give too narrow a construction to a statute which was intended to be more compre-

hensive. United States v. Johnson, 319 U.S. 503, 515 (1943). The filing of a false report or return is not even an essential element of the crime. United States v. Albanese, 224 F.2d 879, 882 (C.A. 2), cert. denied, 350 U.S. 845 (1955). And the fact that appellant performed many of the overt acts of the conspiracy after the date that Tanz filed his false report is irrelevant. United States v. Johnson, supra at page 515. Of course, the fact that Harper and appellant are neither taxpayers nor revenue agents has no bearing upon their capacity to violate Section 145(b);

> "* * * As the Supreme Court remarks, there is evidently no legislative purpose to exempt from punishment one who actively endeavors to defeat a tax, whatever his relationship to the taxpayer may be." Tinkoff v. United States, 86 F.2d 868, 876 (C.A. 7, 1936), cert. denied, 301 U.S. 689 (1937).

It follows that appellant, Harper, and Tanz all had capacity to violate Section 145(b) of Title 26, and the jury might well have found a conspiracy from those events and conversations which occurred between Harper and appellant.

There is nothing inconsistent in the acquittal of Tanz and the conviction of appellant Gordon. No one disputes that at least two members are necessary to form a conspiracy because this is specifically required by Section 371 of Title 18. One man cannot conspire alone. Where there are only two defendants indicted on a conspiracy charge and there is no evidence implicating anyone else, the acquittal of one requires the acquittal of the other. See United States v. Fox, 130 F.2d 56, 57 (C.A. 3), cert. denied, 317 U.S. 666 (1942); United States v. Masiello, 235 F.2d 279, 280 (C.A. 2), cert. denied sub nom. Stickel v. United States, 352 U.S. 882 (1956). However, if the indictment names even persons unknown as co-conspirators, and there is evidence to support the charge that one of the two defendants conspired with the unknown persons, that de-

fendant's conviction may stand in spite of the fact that the other defendant was acquitted. See Rogers v. United States, 340 U.S. 367, 375 (1951); Pomerantz v. United States, 51 F.2d 911, 913 (C.A. 3, 1931). If the conviction of one defendant may be sustained for conspiring with unknown persons, certainly it may be sustained where the evidence discloses a conspiracy between the defendant and a named co-conspirator, even if the latter is not indicted. Miller v. United States, 24 F.2d 353, 361 (C.A. 2), cert. denied, 276 U.S. 638 (1928). Here the evidence tends to disclose a conspiracy between the convicted Gordon and the named but unindicted Harper.

The Sufficiency of the Evidence to Sustain the Conviction.

The second general contention of the appellant concerns the sufficiency of the evidence to sustain Gordon's conviction. It is our opinion that a mere recital of the facts of this case discloses ample evidence to sustain the conviction. One point raised by appellant, however, does require discussion. On the witness stand Harper denied the existence of the conspiracy. Thus, contends appellant, direct evidence adduced from the government's witness denying the conspiracy so militates against the circumstantial evidence that the required standard of proof has not been met. This argument lacks merit. It would be answer enough to say that all of Harper's denials were stricken from the record upon motion of the government. Exception to this action was taken by appellant, but the point was neither briefed nor argued. But appellant would find little consolation even if Harper's denials had remained part of the record. In prosecutions of federal criminal cases, the government is not bound by the testimony of its witnesses, and the jury may believe part of what a witness says and disbelieve the remainder. United States v. Palese, 133 F.2d 600, 603 (C.A. 3, 1943). We would simply assume that the jury disbelieved Harper's denials but believed his testimony involving himself and appellant

in the conspiracy. The argument is also made that circumstantial evidence should not be permitted to outweigh direct evidence. There is, however, nothing magical or sacrosanct about direct testimony evidence as opposed to circumstantial evidence, especially when it comes from one who is implicated by the circumstances in the conspiracy he seeks to deny.[1]

The Correctness and Adequacy of the Instructions

The third major contention of the appellant is that the instructions were fatally defective in failing to define the offense charged. The record discloses that the appellant did not request any points for charge and did not object to any portion of the instructions after they were delivered. In the absence of a request for charge, a reversal is justified only if the failure to instruct constitutes "a basic and highly prejudicial error." United States v. Levy, 153 F.2d 995, 998 (C.A. 3, 1946). The issue here is thus narrowed to a question of whether such error existed in the charge.

If it were true that the instructions failed to define the offense charged, reversal would indeed be required. United States v. Levy, supra at page 998. The crucial question concerns just how much must be said about the substantive offense in a case charging only the conspiracy to commit that offense. The instruction in this particular case repeated the words of the indictment, and charged a conspiracy

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[1] "Circumstantial evidence is, in the *abstract*, nearly, though perhaps not altogether, as strong as positive evidence; in the *concrete*, it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character, is not so satisfactorily proved, as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility." Gibson, C.J., in Commonwealth v. Harman, 4 Pa. 269, 271-272 (1846). See also Holland v. United States, 348 U.S. 121, 140 (1954).

> "• • • to commit an offense against the United States, that is to say to willfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Alfred W. McClure and Doris K. McClure for the year 1948, in violation of 26 U.S.C. Section 145(b), said conspiracy being in violation of 18 U.S.C. Section 371."

This instruction not only identifies the substantive offense as a violation of Section 145(b) but also describes it in proper statutory language as income tax evasion.[2] We must assume that the jury was one of average intelligence, and after sitting through five days of trial, knew very well what was meant by the simple statutory words used to describe the offense of tax evasion, and the instructions neither confused nor misled them. The appellant agrees that the instructions were adequate in charging the conspiracy. We are of the opinion that they were adequate also in outlining the substantive offense. The cases cited by appellant to support the proposition that it is highly prejudicial not to define the offense to the jury were correctly decided.[3] In those cases, the primary law involved

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[2] The instructions in a prosecution for violation of Section 145(b) must, of course, describe the elements of tax evasion with more technical precision than is necessary for a charge of conspiracy to violate that section. But even in tax evasion prosecutions, where the indictment clearly charges the offense and the substance of the indictment is given to the jury, the instructions are not inadequate regardless of whether they fail to recite the statute or make any reference to it. Holland v. United States, 209 F.2d 516, 522 (C.A. 10), affirmed, 348 U.S. 121 (1954).

[3] Among the cases cited were United States v. Pincourt, 159 F.2d 917 (C.A. 3, 1947)—primary law not explained, read, or mentioned to the jury; United States v. Max, 156 F.2d 13 (C.A. 3, 1946), and United States v. Noble, 155 F.2d 315 (C.A. 3, 1946)—failure to charge the essential elements of the crime; United States v. Levy, 152 F.2d 995 (C.A. 3, 1946)—failure to define offenses charged in the indictment.

was neither read nor explained to the jury. Here the primary law concerning conspiracy[4] was given the jury, and the substantive offense, since the statute is quite simple, was adequately defined.

Tinsley's Testimony

The fourth error alleged by appellant concerns the testimony of the government tax expert Tinsley, who was called upon to prove that the report filed by Tanz with the taxing authorities in 1950 was false. Appellant insists that since not all of the books and records were before the jury, Tinsley's testimony concerning them was error; United States v. Augustine, 189 F.2d 587 (C.A. 3, 1951) is cited in support of that view. It is difficult to understand how this error, if indeed it be error,[5] could possibly affect appellant Gordon, since it was not necessary to prove the falseness of the Tanz report in order to sustain the conviction of Gordon on the charge of conspiracy. See United

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[4] Appellant seems to lose sight of the fact that this case is a *conspiracy* conviction, not a conviction under § 145(b). Certainly not all of the elements necessary to convict under § 145(b) are needed to convict here. "A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." Braverman v. United States, 317 U.S. 49, 54 (1942).

[5] United States v. Augustine, 189 F.2d 587 (C.A. 3, 1951), which was a prosecution not for conspiracy but for actual violation of § 145(b), stated by dictum that it was improper for a witness to testify from records which were not in evidence. However, in the case under consideration, a summary of the pertinent books and records was before the jury in the form of a supplemental year-end statement prepared by McClure for the Ford Motor Co. McClure's original 1948 tax return was also in evidence. And even if the rule applicable to a conspiracy to violate the tax-evasion section were as stringent as the rule in a prosecution for actual violation of that section, it would seem that the holding of the Augustine case would be substantially satisfied. United States v. Augustine, 189 F.2d at page 589.

States v. Albanese, 224 F.2d 879, 882 (C.A. 2, 1955). If it were error, only Tanz would have been prejudiced and, as we have seen, Tanz was acquitted.

The Reading of Harper's Grand Jury Notes

The fifth error alleged concerns the reading into the record of the grand jury notes which contained certain testimony of Harper slightly inconsistent with his testimony in this case. At the trial, Harper testified that Tanz told him that he "knew" of the $3,000 which Harper had given appellant at the hotel in Wilkes-Barre. The prosecution pleaded surprise and was permitted to read the grand jury notes which indicated that Harper had testified that Tanz told him that he had "got" the $3,000 which Harper gave Gordon. The total factual difference is practically inconsequential. The case against appellant Gordon is not affected one way or another by whether Tanz received, or merely knew about, the $3,000 which Harper gave appellant. There was ample evidence in the record that the $3,000 was given to appellant for the McClure tax account. Where the factual change wrought by reading grand jury notes is insubstantial, failure of the trial court to instruct as to the evidentiary value of such notes is not reversible error. United States v. Weinberg, 226 F.2d 161 (C.A. 3, 1955), cert. denied, 350 U.S. 933 (1956). Certainly there is no error where grand jury notes produce no change at all in the state of the record as that record affects the appellant.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(2) Amendment of Opinion

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,972

UNITED STATES OF AMERICA

v.

JULES GORDON, *Appellant*

Present: MARIS, GOODRICH and STALEY, *Circuit Judges.*

ORDER OF COURT

AND NOW, this 1st day of April, 1957, IT IS HEREBY ORDERED that the opinion of this court filed March 1, 1957, in this case, be and it is hereby amended (1) on page 3 of the printed opinion, lines 4 and 5 from the bottom, by transposing the sums "$2,000" and "$500", so that the sentence shall read " • • • handed McClure $2,500 in cash, saying that $500 was from him and $2,000 was from Tanz"; and (2) on page 6 of the printed opinion, lines 19 to 25, by deleting the three sentences reading: "It would be answer enough to say that all of Harper's denials were stricken from the record upon motion of the government. Exception to this action was taken by appellants, but the point was neither briefed nor argued. But appellant would find little consolation even if Harper's denials had remained part of the record."

By THE COURT,

STALEY,
Circuit Judge.

APPENDIX B

JUDGMENT BELOW

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,972

UNITED STATES OF AMERICA

v.

JULES GORDON, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, GOODRICH and STALEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pensylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 1, 1957

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 952

JULES GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–11a) is reported at 242 F. 2d 122.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1957 (Pet. 12a), and a petition for rehearing was denied April 1, 1957. The petition for a writ of certiorari was filed on April 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient competent evidence to support petitioner's conviction for conspiring to

attempt to evade and defeat the income taxes of another.

2. Whether the trial court committed prejudicial error in permitting an expert witness to compute the income tax liability of a taxpayer upon the basis of records he had personally examined.

3. Whether the trial court's instruction to the jury adequately defined the offense alleged in the indictment.

STATUTES INVOLVED

18 U. S. C.:

> SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truth-

fully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

On July 14, 1955, petitioner was indicted with Norman Tanz, an Internal Revenue agent, in the United States District Court for the Eastern District of Pennsylvania for conspiring to commit an offense against the United States, *i. e.*, willfully attempting to evade and defeat a large part of the income taxes of Alfred W. McClure for the year 1948. (R. 1a–4a.)[1] Clifford Harper, accountant for McClure, was named as a co-conspirator but not a co-defendant. After a jury trial, Tanz was acquitted and petitioner was found guilty as charged. On May 25, 1956, he was sentenced to imprisonment for one year and fined $1,000. (R. 324a, 326a.)

The evidence to support the verdict may briefly be summarized as follows:

McClure was an automobile dealer whose income tax returns for 1947 and 1948 had been prepared by Harper. (R. 15a, 47a, 163a.) Upon the basis of his net profit, as stated in a financial report prepared for

[1] The record consists of the appendices filed in the court below, that of appellant being paginated "1a–326a", and that of appellee, "1b–26b."

the Ford Motor Company, McClure's income taxes for the year 1948 should have been $5,449.08.[2] (R. 249a–252a.) This report was used by Harper when he prepared the 1948 return (R. 164a–169a); yet the return reported taxes of only $1,315.70. (R. 219a–220a.) In April 1950, Revenue Agent Tanz began an audit of the return, and he ultimately submitted a report assessing McClure's taxes for 1948 at only $1,808.50.[3] (R. 219a–220a, 251a–252a.) Tanz also used the Ford Motor Company report during the course of his audit (R. 122a, 1b–6b), but the amount of tax he assessed for 1948 was almost $4,000 less than it should have been on the basis of that report (R. 249a–251a).

Shortly after Tanz began his audit, he told McClure that he was in trouble and would probably have to pay about $17,000 additional taxes for 1947 and 1948 (R. 21a, 34a); but after a series of conferences between Tanz and Harper, Tanz finally said he had a friend who could probably effect a quick closing of the case for a tax of about half that amount (R. 142a–151a). McClure was given to understand that he would have to pay about $9,500 additional taxes for the two years involved, and he gave Harper $5,000 to be applied to this liability. (R. 22a–24a, 51a–52a.)

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[2] This financial report was introduced in evidence. Upon the basis of a complete audit of all McClure's books by Revenue Agent Tinsley, however, his income tax for the year 1948 should have been $11,640.76. (R. 249a–252a.)

[3] For the year 1947, McClure reported $3,315.10, whereas his tax should have been $7,472.11 on the basis of the Ford Motor Company statement. Tanz' report assessed the tax at $6,859.65.

Harper met Tanz' "friend", who turned out to be petitioner,[4] and gave him $3,000 in currency. Petitioner accepted the money, but indicated somewhat indignantly that he had expected more. (R. 151a–154a.) Tanz turned in a report to his superiors indicating that McClure owed about $4,500 in additional taxes and interest for 1947 and 1948. (R. 7a.)

Some time later, McClure received a bill from Internal Revenue for the $4,500. (R. 155a, 159a.) Meanwhile, however, he had had his books audited by an accounting firm, Evans and Bennett, and they reported to him that, according to their calculations, his additional taxes for 1947 and 1948 would be only about $4,300 instead of $9,500 as he had been advised by Tanz. (R. 56a–67a.) McClure was warned by the accountants that the transaction with petitioner, Harper and Tanz looked like a shakedown, and he decided that he had paid enough. (R. 69a, 83a, 97a.) A meeting was arranged between McClure, Harper and petitioner. Petitioner cautioned McClure at the outset that he could be prosecuted for filing a false return, said that he was in a hurry to keep another appointment, and urged McClure to make out a check for the $4,500 additional taxes and penalties. McClure, insisting that he had paid enough, refused to make out the check. After considerable discussion, petitioner offered to return some of the money which had been given to him by Harper, if ~~petitioner~~ McClure would make out a check for $4,500 to the Collector of In-

[4] Petitioner used the names "Jones" and "Smith" during his transactions with Harper and McClure. (R. 151a, 157a.)

ternal Revenue. The result was that petitioner returned $2,500 to McClure while Harper returned $1,800, and McClure then made out a check for $4,500 and mailed it to the Collector. (R. 27a–33a, 93a–97a, 158a–159a, 178a–179a.)

Petitioner did not take the stand and offered no evidence in his own behalf.

ARGUMENT

1. Petitioner argues (Pet. 8–11) that there was no competent evidence in the record to establish the falsity of Tanz' report, and that there was, consequently, no sufficient evidence to establish a conspiracy, between himself, Tanz and Harper, to evade and defeat McClure's taxes for 1948. But petitioner fails to mention the statement prepared for the Ford Motor Co., which was in evidence and which formed the basis for the Government's calculation of the taxes actually owed by McClure for 1948. (R. 249a–250a.) Harper used that statement in preparing the original return; Tanz used it in preparing the report of his audit; and Revenue Agent Tinsley also used it in preparing his subsequent report. The return prepared by Harper assessed McClure's tax for 1948 at $1,315.70; Tanz assessed only $1,808.50; but Tinsley assessed a tax of $5,449.08. Petitioner does not dispute the fact that there was overwhelming evidence of *a* conspiracy between himself, Tanz and Harper. We submit that the Ford Motor Co. statement clearly provided a basis for a conclusion by the jury that Tanz submitted a false report to his superiors and that one of the objects of the conspiracy was to enable

McClure to evade a large part of his taxes for 1948. Petitioner relies heavily (Pet. 4–5, 9) on the assertion that the Evans and Bennett audit of McClure's books reached a conclusion substantially the same as that of Tanz. But this was simply an item of evidence for the jury to weigh, and it is significant that all the testimony as to the result of the Evans and Bennett audit came from McClure himself and no member of that firm was called to the stand by the defense.[5] There was substantial competent evidence to support the verdict, and petitioner's argument is without merit.

The inconsistency of the jury action in acquitting Tanz provides, of course, no basis for a reversal as to petitioner. In a similar case in the Second Circuit, a jury had acquitted two revenue agents who had been among those indicted for a conspiracy to violate the National Prohibition Act. The opinion of Judge Learned Hand states (*Uniter States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233, certiorari denied, 279 U. S. 863):

> * * * How an intelligent jury could have acquitted any of the defendants we cannot conceive.
>
> Unfortunately they did just that in the case of Chamberlain and Jackson, and this inconsistency is one ground of the appeal. If the verdict had left only one defendant who could be guilty, undoubtedly it could not stand. * * *

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[5] Actually the result reached by Evans and Bennett for 1948 appears to have been more nearly in accord with that of Revenue Agent Tinsley than with that of Tanz. (R. 264a–265a.)

> There must be other possible conspirators, not acquitted, for a conspiracy is an agreement. * * * The verdict must not itself deny the existence of the essential facts. But it is not a variance to fail to convict all those indicted, though strictly the agreement laid is then not the agreement proved. * * * Even so, the appellants argue that a scrutiny of the evidence discloses that in the nature of things they could not have been engaged in the venture, unless Jackson and Chamberlain were also in it as their privies.
>
> Upon that assumption there undoubtedly results a rational inconsistency between the verdicts; the conviction finds that the appellants have done what they could not have done alone; the acquittal, that their inevitable accomplices did not share in it with them. * * * We need only consider whether there is any indication that the jury was improperly moved to convict, and upon that question the acquittal throws no light whatever. There is not the slightest reason to assume that they convicted the appellants as part of a bargain to acquit the agents; this may have been the case, but it does not appear. So we have nothing to do with the rational enmeshing of the two findings; each was made separately, each need only bear its own defects. The problem is precisely similar to that when the verdicts upon two counts are logically inconsistent. * * *

In the present case, despite the acquittal of Tanz, there remained two conspirators, Harper and petitioner.

2. In addition to computing McClure's tax liability for 1948 upon the basis of the Ford Motor Co. statement (which was in evidence), Revenue Agent Tinsley also testified that he had made a thorough analysis of McClure's books, and upon the basis of that analysis he computed the 1948 tax at $11,640.76. (R. 217a–219a, 221a, 251a.) Since these books and records were not introduced in evidence at the trial, petitioner argues (Pet. 2, 7, 9–10) that this second computation should not have been admitted.

Petitioner is in no position to complain of the trial court's ruling, although it may not have been strictly in accord with the best-evidence rule. If Tinsley's analysis of McClure's books had been susceptible to attack, the books would certainly have been introduced by the defense and a member of the Evans and Bennett firm would have been called to the stand in refutation of Tinsley. Instead, although the Government offered to produce the books in response to the defense objection, defense counsel ignored the offer, stating that he had taken "strictly a legal position". (R. 258a.) Since the Ford Motor Co. statement, as pointed out above, provided ample evidence of the falsity of the Tanz report, and since there is nothing to indicate that Tinsley's summary of the books was in any way inaccurate, this portion of the argument states no ground for further review by this Court.

3. Finally, petitioner contends that the trial court's instruction to the jury failed to define the substantive offense which he was charged with conspiring to commit. He does not contend that the definition omitted

any of the elements of the attempt to evade taxes made criminal by Section 145 (b), or that it was inaccurate in any manner, but complains that it consisted of only a brief reading from the indictment. (Pet. 11.)[6] As this Court noted in *United States* v. *Bayer*, 331 U. S. 532, 536, the brevity of an instruction does not make it erroneous.

Moreover, at the trial, petitioner's counsel advised the court that he had "no special requests for charge" (R. 311a), and, as petitioner concedes (Pet. 11), he did not object to the instruction given. Having remained silent, he cannot complain on appeal that the instruction, though accurate, was not as elaborate as he desired. Federal Rules of Criminal Procedure, Rule 30; *Humes* v. *United States*, 170 U. S. 210, 211–212; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575; *Isaacs* v. *United States*, 159 U. S. 487, 490–491. In the cases relied on by petitioner (Pet. 11),[7] substantial errors or omissions were made in the instructions. The Court of Appeals, noting that a re-

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[6] The trial court, reading the indictment, instructed the jury that the offense which the defendants were charged with conspiring to commit was to "* * * wilfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Alfred W. McClure and Doris K. McClure for the year 1948, in violation of 26 USC Section 145 (b) * * *". (R. 314a.)

[7] *United States* v. *Lang*, 239 F. 2d 676 (C. A. 3d); *United States* v. *Cumberland*, 200 F. 2d 609 (C. A. 3d); *United States* v. *Petrie*, 184 F. 2d 417 (C. A. 3d); *United States* v. *Pincourt*, 159 F. 2d 917 (C. A. 3d); *United States* v. *Max*, 156 F. 2d 13 (C. A. 3d); *United States* v. *Noble*, 155 F. 2d 315 (C. A. 3d); *United States* v. *Levy*, 153 F. 2d 995 (C. A. 3d).

versal would be justified, though the point was not preserved, if the instruction prejudiced petitioner (Pet. 7a), properly concluded that it adequately outlined the substantive offense (Pet. 8a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1957.

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